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2012

## Global Legal Pluralism: A Jurisprudence of Law Beyond Borders (Introduction)

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### Recommended Citation

Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*, 3, Cambridge University Press, 2012

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# 1 Introduction

**WE LIVE IN A WORLD OF MULTIPLE OVERLAPPING** normative communities. For example, I am typing these words in a house in Massachusetts, although I am a resident of Maryland, who works in Washington, DC. Thus, Massachusetts state law may govern some of my activities, while Maryland law or DC law may be relevant to other aspects of my life. And in Massachusetts, Maryland, and DC I am also located within a variety of political sub-divisions, such as towns, cities, counties, wards, neighborhood districts, water regions, and so on, each of which may have normative authority over me. Federal law governs many aspects of my life as well, from the speed limits on the interstate highways to certain environmental standards affecting the air and water, to the individual liberties the U.S. Constitution protects. International law may be the source of additional rights or protections, ranging from standards for trade, technology, and the use of satellites to the frameworks for regulating the environment, consumer product labeling, and the conduct of war. And certainly if I travel abroad or surf Internet sites based overseas or enter into contracts with foreign entities I will run up against international and transnational legal norms.

But these governmental normative communities are just the tip of the iceberg. Nonstate communities may also impose significant normative force. For example, if I think someone is violating the copyright of this book, I may use international arbitration sanctioned by the World

Intellectual Property Organization, a nongovernmental entity. If Web searches for my book do not place my Web page high enough on the list, I may need to challenge Google's search indexing protocols. And I am governed (or at least strongly influenced) by tenure rules at my university, religious rules of my faith (if I am a believer), American Bar Association rules regarding the conduct of law school classrooms, the metrics used by *US News & World Report* when it ranks law schools, and simply the practices and customs of the academic community of which I am a part. And on and on.

This book seeks to grapple with the complexities of law in a world where a single act or actor is potentially regulated by multiple legal or quasi-legal regimes. Law often operates based on a convenient fiction that nation-states exist in autonomous, territorially distinct spheres and that activities therefore fall under the legal jurisdiction of only one regime at a time. Thus, traditional legal rules have tied jurisdiction to territory: a state could exercise complete authority within its territorial borders and no authority beyond it. In the twentieth century, such rules were loosened, but territorial location remained the principal touchstone for assigning legal authority. Accordingly, if one could spatially ground a dispute, one could most likely determine the legal rule that would apply.

But consider such a system in today's world. Should the U.S. government be able to sidestep the U.S. Constitution when it houses prisoners in "offshore" detention facilities in Guantánamo Bay or elsewhere around the world? Should spatially distant corporations that create serious local harms be able to escape local legal regulation simply because they are not physically located in the jurisdiction? When the U.S. government seeks to shut down the computer of a hacker located in Russia, does the virus transmitted constitute an act of war or a violation of Russia's sovereignty? Does it make sense to think that satellite transmissions, online interactions, and complex financial transactions have any territorial locus at all? How can we best understand the complex relationships among international, regional, national, and subnational legal systems?

And in a world where nonstate actors such as industry standard-setting bodies, nongovernmental organizations, religious institutions, ethnic groups, terrorist networks, and others exert significant normative pull, can we build a sufficiently capacious understanding of the very idea of jurisdiction to address the incredible array of overlapping authorities that are our daily reality?

Thus, a simple model that looks only to territorial delineations among official state-based legal systems is now simply untenable (if it was ever useful to begin with). Thankfully, debates about globalization have moved beyond the polarizing question of whether the nation-state is dying or not. But one does not need to believe in the death of the nation-state to recognize both that physical location can no longer be the sole criterion for conceptualizing legal authority and that nation-states must work within a framework of multiple overlapping jurisdictional assertions by state, international, and even nonstate communities. Each of these types of overlapping jurisdictional assertions creates a potentially hybrid legal space that is not easily eliminated.

With regard to conflicts between and among states, the growth of global communications technologies, the rise of multinational corporate entities with no significant territorial center of gravity, and the mobility of capital and people across borders mean that many jurisdictions will feel effects of activities around the globe, leading inevitably to multiple assertions of legal authority over the same act, without regard to territorial location. For example, in 2000 a French court asserted jurisdiction over the U.S.-based web portal Yahoo! because French users could download Nazi memorabilia and Holocaust denial material via Yahoo!'s auction sites, in violation of French law.<sup>1</sup> Yahoo! argued in response that the French assertion of jurisdiction was impermissibly extraterritorial in scope because Yahoo!, as a U.S. corporation transmitting material

<sup>1</sup> Tribunal de grande instance (TGI) [ordinary court of original jurisdiction] Paris, May 22, 2000, Ordonnance de référé, *UEJF et Licra c/ Yahoo! Inc. et Yahoo France*, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm>.

uploaded in the United States, was protected by the First Amendment of the U.S. Constitution.<sup>2</sup> Yet, the extraterritoriality charge runs in both directions. If France is *not* able to block the access of French citizens to proscribed material, then the United States will effectively be imposing First Amendment norms on the entire world. And whatever the solution to this problem might be, a territorial analysis will not help because the relevant transaction is both “in” France and not “in” France simultaneously. Cross-border environmental,<sup>3</sup> trade,<sup>4</sup> intellectual property,<sup>5</sup> and tax regulation<sup>6</sup> raise similar issues.

The problem of multiple states’ asserting jurisdiction over the same activity is just the beginning, however, because nation-states must also often share legal authority with one or more international and regional courts, tribunals, or regulatory entities. Indeed, the Project on International Courts and Tribunals has identified approximately 125 international institutions, all issuing decisions that have some effect on state legal authority,<sup>7</sup> though those decisions are sometimes deemed binding, sometimes merely persuasive, and often fall somewhere between the two. For example, under the North American Free Trade Agreement (NAFTA) and other similar agreements, special panels can pass judgment

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Rebecca M. Bratspies & Russell A. Miller eds., 2006); Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 *N.Y.U. J. Int’l L. & Pol.* 527 (2001).

<sup>4</sup> See, e.g., Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 *Geo. Int’l Envtl. L. Rev.* 1 (1999).

<sup>5</sup> See, e.g., *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento de Barcelona*, 330 F.3d 617 (4th Cir. 2003); *GlobalSantaFe Corp. v. GlobalSantaFe.com*, 250 F. Supp. 2d 610 (E.D. Va. 2003); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 *U. Pa. L. Rev.* 469 (2000).

<sup>6</sup> See, e.g., Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 *U. Pa. L. Rev.* 311, 334–7 (2002).

<sup>7</sup> See Project on International Courts and Tribunals, *The International Judiciary in Context* (2004), available at [http://www.pict-pecti.org/publications/synoptic\\_chart/Synop\\_C4.pdf](http://www.pict-pecti.org/publications/synoptic_chart/Synop_C4.pdf).

on whether domestic legal proceedings have provided fair process.<sup>8</sup> And though the panels cannot directly review or overturn local rulings, they can levy fines against the federal government signatories of the agreement, thereby undermining the impact of the local judgment.<sup>9</sup> Thus, now that a NAFTA tribunal has ruled that the conduct of a Mississippi trial against a Canadian corporation “was so flawed that it constituted a miscarriage of justice amounting to manifest injustice as that expression is understood in international law,”<sup>10</sup> it is an open question as to how Mississippi courts will rule in future cases involving foreign defendants.<sup>11</sup> Meanwhile, in the realm of human rights, we have seen criminal defendants convicted in state courts in the United States proceed (through their governments) to the International Court of Justice (ICJ) to argue that they were denied the right to contact their consulate, as required by treaty.<sup>12</sup> Again, although the ICJ judgments are technically unenforceable in the United States, at least one state court followed the ICJ’s command anyway.<sup>13</sup> Meanwhile, outside these more formal adjudicative processes, there are many powerful transnational networks of governmental regulators setting a kind of international policy as a *de facto* matter over much of the global financial system, among other areas.<sup>14</sup>

Finally, nonstate legal (or quasi-legal) norms add to this pluralism of authority. Given increased migration and global communication, it is not

<sup>8</sup> See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 7–17, 1992, art. 1135, 32 I.L.M. 605, 646.

<sup>9</sup> *Id.*

<sup>10</sup> *Loewen Group, Inc. v. United States*, ICSID (W. Bank) Case No. ARB(AF)/98/3 (June 26, 2003) (Final Merits Award), reprinted in 42 I.L.M. 811 (2003), also available at <http://naftaclaims.com/Disputes/USA/Loewen/LoewenFinalAward.pdf>. Publicly released documents on all NAFTA disputes are available at <http://www.naftalaw.org>.

<sup>11</sup> See generally Robert B. Ahdieh, Between Dialogue and Decree: International Review of National Courts, 79 *N.Y.U. L. Rev.* 2029 (2004) (discussing case).

<sup>12</sup> See *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12.

<sup>13</sup> See *Torres v. State*, No. PCD-04-442, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004) (granting stay of execution and remanding case for evidentiary hearing).

<sup>14</sup> See, e.g., David Zaring, Rulemaking and Adjudication in International Law, 46 *Colum. J. Transnat’l L.* 563 (2008); David Zaring, Informal Procedure, Hard and Soft, in *International Administration*, 5 *Chi. J. Int’l L.* 547 (2005).

surprising that people feel ties to, and act on the basis of affiliations with, multiple communities in addition to their territorial ones. Such communities may be ethnic, religious, or epistemic; transnational, subnational, or international; and the norms asserted by such communities frequently challenge territorially based authority. Indeed, canon law and other religious community norms have long operated in significant overlap with state law. And in the Middle East and elsewhere, conflicts between a personal law tied to religion and a territorial law tied to the nation-state continue to pose constitutional and other challenges.<sup>15</sup> Bonds of ethnicity can also create significant normative communities. For example, some commentators advocate regimes that give ethnic minorities limited autonomy within larger nation-states.<sup>16</sup> Transnationally, when members of an ethnic diaspora purchase securities issued by their “home” country, one might argue that, regardless of where, territorially, the bonds are purchased, the transactions should be governed by the law of the “homeland.”<sup>17</sup> Finally, we see communities of transnational bankers and accountants developing their own regulatory regimes governing trade finance<sup>18</sup> or accounting standards,<sup>19</sup> as well as the use of modern forms of *lex mercatoria*<sup>20</sup> to

<sup>15</sup> See, e.g., Chibli Mallat, On the Specificity of Middle Eastern Constitutionalism, 38 *Case W. Res. J. Int'l L.* 13, 47–55 (2006).

<sup>16</sup> See, e.g., Henry J. Steiner, Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities, 66 *Notre Dame L. Rev.* 1539, 1541–2 (1991) (identifying three different types of autonomy regimes for ethnic minorities).

<sup>17</sup> See Anupam Chander, Diaspora Bonds, 76 *N.Y.U. L. Rev.* 1005, 1060–74 (2001) (describing debt instruments offered by the Indian government to raise capital principally from its diaspora).

<sup>18</sup> See Janet Koven Levit, A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments, 30 *Yale J. Int'l L.* 125 (2005).

<sup>19</sup> For example, the International Accounting Standards Board is an independent, not-for-profit organization that seeks “to develop a single set of high quality, understandable, enforceable and globally accepted international financial reporting standards.” IFRS Foundation, About the IFRS Foundation and the IASB, available at <http://www.ifrs.org/The+organisation/IASCF+and+IASB.htm>.

<sup>20</sup> See, e.g., Clayton P. Gillette, The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG, 5 *Chi. J. Int'l L.* 157, 159 (2004) (noting that the Convention “explicitly incorporates trade usages into contracts that it governs, permits usages to trump conflicting [Convention] provisions, and authorizes courts to

govern business relations.<sup>21</sup> Such nonstate legal systems often influence (or are incorporated in) state or international regimes.<sup>22</sup>

These spheres of complex overlapping legal authority are, not surprisingly, sites of conflict and confusion. In response to this hybrid reality, communities might seek to “solve” such conflicts either by reimposing the primacy of territorially based (and often nation-state-based) authority or by seeking universal harmonization. Thus, on the one hand, communities may try to seal themselves off from outside influence, either by retreating from the rest of the world and becoming more insular (as many religious groups seek to do), by building walls either literal or regulatory to protect the community from outsiders, by taking measures to limit outside influence (U.S. legislation seeking to discipline judges for citing foreign or international law is but one prominent example), or by falling back on territorially based jurisdiction or choice-of-law rules. At the other extreme, we see calls for harmonization of norms, more treaties, the construction of international governing bodies, and the creation of “world law.”

interpret and complete contracts by reference to usages”). *But see* Celia Wasserstein Fassberg, *Lex Mercatoria – Hoist with Its Own Petard?* 5 *Chi. J. Int’l L.* 67 (2004) (arguing that the modern revival of *lex mercatoria* departs significantly from the historical conception).

<sup>21</sup> See, e.g., Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 *Yale L. & Pol’y Rev.* 1 (2004) (using game theory to argue that the existence of preexisting networks enhances a private legal system’s ability to enforce norms); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. Legal Stud.* 115 (1992) (discussing the system of “private law-making” in the New York Diamond Dealers Club); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 *Mich. L. Rev.* 1724 (2001) (describing the nonstate legal system used to govern commercial transactions in the cotton industry); Eric A. Feldman, *The Tuna Court: Law and Norms in the World’s Premier Fish Market*, 94 *Cal. L. Rev.* 313 (2006) (discussing a “Tuna Court” in Japan that adjudicates disputes about sale prices in a tuna market).

<sup>22</sup> See, e.g., Levit, *supra* note 18, at 165 (describing ways in which formal lawmaking institutions such as the World Trade Organization have, over time, appropriated nonstate trade finance norms into their official legal instruments). See generally Carol Weisbrod, *Fusion Folk: A Comment on Law and Music*, 20 *Cardozo L. Rev.* 1439 (1999) (using the incorporation of folk music into “high culture” classical compositions as a metaphor for understanding the relationship between state and nonstate law).



I argue that we should be wary of pinning our hopes on legal regimes that rely either on reimposing sovereigntist<sup>23</sup> territorial insularity or on striving for universals. Not only are such strategies sometimes normatively undesirable, but more fundamentally they simply will not be successful in many circumstances. As I will address in more detail, the influence and application of foreign norms or foreign decision-making bodies may be useful and productive, but in any event they are inevitable and cannot be willed away by fiat.

Therefore, I suggest an alternative response to legal hybridity: *we might deliberately seek to create or preserve spaces for productive interaction among multiple, overlapping legal systems by developing procedural mechanisms, institutions, and practices that aim to manage, without eliminating, the legal pluralism we see around us.* Such mechanisms, institutions, and practices can help mediate conflicts by recognizing that multiple communities may legitimately wish to assert their norms over a given act or actor, by seeking ways of reconciling competing norms, and by deferring to alternative approaches if possible. And even when a decision maker cannot defer to an alternative norm (because some assertions of norms are repressive, violent, and/or profoundly illiberal), procedures for managing pluralism can at least require an explanation of why deference is impossible.

The excruciatingly difficult case-by-case questions concerning how much to defer to another normative community and how much to impose the norms of one's own community are probably impossible to answer definitively. The crucial antecedent point, however, is that although people may never reach agreement on norms, they may at least acquiesce in procedural mechanisms, institutions, or practices that take pluralism seriously, rather than ignoring it through assertions of territorially based power or dissolving it through universalist imperatives. Processes for managing pluralism seek to preserve spaces of opportunity for contestation

<sup>23</sup> I borrow the term "sovereigntist" from Peter Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, *Foreign Affairs* 9–15 (Nov./Dec. 2000).

and local variation. Accordingly, a focus on hybridity may at times be both normatively preferable and more practical precisely because agreement on substantive norms is so difficult. And again, the claim is only that the independent values of pluralism should always be factored into the analysis, not that they should never be trumped by other considerations.

Of course, even if pluralist institutions and processes better reflect the complexity of the world around us, that is not necessarily a reason to adopt them. Yet, we may find that the added norms, viewpoints, and participants produce better decision making, better adherence to those decisions by participants and nonparticipants alike, and ultimately better real-world outcomes. And while this may not always be so, the essential point is that in the design of procedures, institutions, and discursive practices these possible benefits need to be considered.

This alternative jurisprudence I propose is fundamentally both *cosmopolitan* and *pluralist*. Thus, I should take a moment at the outset to explain what I mean by both terms. This is particularly important because in political and scholarly discourse these terms are often subject to varying uses, meanings, and connotations.

By cosmopolitan, I mean to invoke a framework recognizing that we are all fundamentally members of multiple communities, both local and global, territorial and epistemic. Unfortunately, many conflate cosmopolitanism with universalism.<sup>24</sup> Yet cosmopolitanism does not require a belief in a single global welfare or even a single universal set of governing norms; nor does it necessarily require that global welfare trump state or local welfare. Instead, cosmopolitanism is a useful trope for conceptualizing the current period of interaction across territorial borders precisely

<sup>24</sup> See, e.g., Viet D. Dinh, Nationalism in the Age of Terror, 56 *Fla. L. Rev.* 867, 879 (2004) ("Rather than aspiring to *universal cosmopolitanism*, statelessness may well foster reversion to a selfish individualism.") (emphasis added); see also Bruce Ackerman, Rooted Cosmopolitanism, 104 *Ethics* 516, 534 (1994) ("If I were a European right now, I hope I would have the guts to stand up for rootless cosmopolitanism: forget this nationalistic claptrap, and let us build a world worthy of free and equal human beings."); Anupam Chander, Diaspora Bonds, 76 *N.Y.U. L. Rev.* 1005, 1046 (2001) ("The cosmopolitan model ... dissolves the multirootedness of diasporas into a global identity.").

because it recognizes that people have multiple affiliations, extending from the local to the global (and many nonterritorial affiliations as well). Thus, cosmopolitanism is emphatically not a model of international citizenship in the sense of international harmonization and standardization, but is instead a recognition of multiple refracted differences where people acknowledge links with the “other” without demanding either assimilation or ostracism.

Pluralism goes even further and recognizes that our conception of law must include more than just officially sanctioned governmental edicts or formal court documents. As discussed previously, many different non-state communities assert various forms of jurisdiction and impose all kinds of normative demands. Moreover, people often feel themselves to be bound by such entities, regardless of the formal status of those entities. Indeed, legal pluralists have long noted that law does not reside solely in the coercive commands of a sovereign power.<sup>25</sup> Rather, law is constantly

<sup>25</sup> See, e.g., Sally Falk Moore, Legal Systems of the World: An Introductory Guide to Classifications, Typological Interpretations, and Bibliographical Resources, in *Law and the Social Sciences* 11, 15 (Leon Lipson & Stanton Wheeler eds., 1986) (“[N]ot all the phenomena related to law and not all that are lawlike have their source in government.”). For further discussions of legal pluralism, see Keebet von Benda-Beckmann, Transnational Dimensions of Legal Pluralism, in *Begegnung und Konflikt: eine kulturanthropologische Bestandsaufnahme* 33, 33–48 (2001); Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (William Twining & Christopher McCrudden eds., 2d ed., 2002); *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005); Gunther Teubner, ‘Global Bukowina’: Legal Pluralism in the World Society, in *Global Law Without a State* 3–28 (Gunther Teubner ed., 1997); Carol Weisbrod, *Emblems of Pluralism: Cultural Differences and the State* (2002); Franz von Benda-Beckmann, Who’s Afraid of Legal Pluralism? 47 *J. Legal Pluralism & Unofficial L.* 37 (2002); David M. Engel, Legal Pluralism in an American Community: Perspectives on a Civil Trial Court, 5 *Am. B. Found. Res. J.* 425 (1980); Marc Galanter, Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law, 19 *J. Legal Pluralism* 1, 28–34 (1981); John Griffiths, What Is Legal Pluralism? 24 *J. Legal Pluralism & Unofficial L.* 1 (1986); Sally Engle Merry, Legal Pluralism, 22 *Law & Soc’y Rev.* 869, 870 (1988) [hereinafter Merry, Legal Pluralism]; Sally Falk Moore, Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study, 7 *Law. & Soc’y Rev.* 719 (1973) [hereinafter Moore, The Semi-Autonomous Social Field]; Balakrishnan Rajagopal, The Role of Law in Counter-hegemonic Globalization

constructed through the contest of these various norm-generating communities.<sup>26</sup> Thus, although “official” norms articulated by sovereign entities obviously count as “law,” such official assertions of prescriptive or adjudicatory jurisdiction are only some of the many ways in which normative commitments arise.

Moreover, legal pluralists have sought to document hybrid legal spaces, where more than one legal, or quasi-legal, regime occupies the same social field.<sup>27</sup> Historically, such sites were most prominently associated either with colonialism – where the legal system imposed by empire was layered on top of indigenous legal systems<sup>28</sup> – or the study of religion – where, as noted previously, canon law and other spiritual codes have often existed in an uneasy relationship with the state legal system.<sup>29</sup>

and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India, 18 *Leiden J. Int'l L.* 345 (2005) (U.K.); Brian Z. Tamanaha, A Non-Essentialist Version of Legal Pluralism, 27 *J.L. & Soc'y* 296 (2000); Sally Engle Merry, *International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism* (Studies in Law, Politics, & Society, Vol. 41 Austin Sarat ed., 2007).

<sup>26</sup> See Robert Cover, Foreword: Nomos and Narrative, The Supreme Court 1982 Term, 97 *Harv. L. Rev.* 4, 43 (1983) [hereinafter Cover, Nomos and Narrative] (“The position that only the state creates law ... confuses the status of interpretation with the status of political domination.”); see also Robert Cover, The Folktales of Justice: Tales of Jurisdiction, in *Narrative, Violence, and the Law: The Essays of Robert Cover* 173, 176 (Martha Minow, Michael Ryan, & Austin Sarat eds., 1992) (“[A]ll collective behavior entailing systematic understandings of our commitments to future worlds [can lay] equal claim to the word ‘law.’”) (alterations in original); Perry Dane, The Maps of Sovereignty: A Meditation, 12 *Cardozo L. Rev.* 959, 963–4 (1991) (“This Article belongs to a body of legal scholarship that refuses to limit the domain of law to the law of the state.”).

<sup>27</sup> See Moore, The Semi-Autonomous Social Field, *supra* note 25, at 720.

<sup>28</sup> See, e.g., Leopold Pospisil, Modern and Traditional Administration of Justice in New Guinea, 19 *J. Legal Pluralism* 93 (1981).

<sup>29</sup> See, e.g., Carol Weisbrod, *The Boundaries of Utopia* (1980) (examining the contractual underpinnings of four nineteenth-century American religious utopian communities: the Shakers, the Harmony Society, Oneida, and Zoar). As Marc Galanter has observed, the field of church and state is the “locus classicus of thinking about the multiplicity of normative orders.” Galanter, *supra* note 25, at 28; see also Carol Weisbrod, Family, Church and State: An Essay on Constitutionalism and Religious Authority, 26 *J. Fam. L.* 741 (1988) (analyzing church-state relations in the United States from a pluralist perspective).

Legal pluralists explored the myriad ways that overlapping legal systems interact with each other and observed that the very existence of multiple systems can at times create openings for contestation, resistance, and creative adaptation.<sup>30</sup>

In this book, I apply a cosmopolitan pluralist framework to the global arena and argue that this framework is essential if we are to more comprehensively conceptualize a world of hybrid legal spaces. This approach, I realize, is unlikely to be fully satisfying either to committed nation-state sovereigntists or to committed universalists. Indeed, these poles in some ways echo those that Martii Koskenniemi famously identified as the irreconcilable positions inherent in all international legal argument.<sup>31</sup> Thus, sovereigntists will object to the idea that nation-states should ever take into account international, transnational, or nonstate norms.<sup>32</sup> Universalists, for their part, will chafe at the idea that international norms should ever be subordinated to local practices that may be less liberal or less rights-protecting. And even hard-line pluralists will complain that a view focusing on how official actors respond to hybridity is overly state-centric.

All I can say to such objections is that if a perspective displeases everyone to some extent, it is, for that very reason, also likely to be a perspective that manages hybridity in the only way possible: by forging provisional compromises that fully satisfy no one but may at least generate grudging acquiescence. And, in a world of multiple norms, such provisional compromises may ultimately be the best we can do. In any event, the central argument of this book is that hybridity is a reality we cannot escape, and a pure sovereigntist or universalist position will often be unsustainable as a practical matter. Thus, cosmopolitan pluralism offers

<sup>30</sup> See, e.g., Merry, *Legal Pluralism*, *supra* note 25, at 878 (noting room for resistance and autonomy within plural systems).

<sup>31</sup> See Martii Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) (rev. ed. 2006). I am grateful to Duncan Hollis for identifying key points of contact between my argument and Koskenniemi's.

<sup>32</sup> In part, this objection is grounded in concerns about loss of democratic accountability and legitimacy. I address some of these concerns in Chapter 3.

both a more accurate descriptive account of the world we live in and a potentially useful alternative approach to the design of procedural mechanisms, institutions, and discursive practices.

Of course, one thing that a cosmopolitan pluralist approach will *not* do is provide an authoritative metric for determining which norms should prevail in this messy hybrid world. Nor does it definitively answer the question of who gets to decide. Indeed, pluralism fundamentally challenges both positivist and natural rights-based assumptions that there can ever be a single answer to such questions. For example, as pluralists have documented in the colonial context, the state's efforts to squelch a nonstate community are likely only to be partial,<sup>33</sup> and so the state's assertion of its own trumping authority is not the end of the debate, but only one gambit in an ongoing normative discourse that has no final resolution. Likewise, there is no external position from which one could make a definitive statement as to who is authorized to make decisions in any given case. Rather, a statement of authority is itself inevitably open to contest. Power disparities matter, of course, and those who wield coercive force may be able to silence competing voices for a time. But even that sort of temporary silencing is rarely the end of the story either. Thus, instead of the unitary answers assumed by both universalism and sovereignist territorialism, cosmopolitan pluralism provides a "jurisgenerative" model<sup>34</sup> that focuses on the creative interventions made by various communities drawing on a variety of normative sources in ongoing political, rhetorical, and legal iterations.<sup>35</sup>

<sup>33</sup> See, e.g., Lauren Benton, *Making Order out of Trouble: Jurisdictional Politics in the Spanish Colonial Borderlands*, 26 *Law & Soc. Inquiry* 373, 375–6 (2001) (describing jurisdictional politics in seventeenth-century New Mexico and observing that, while "the crown made aggressive claims that royal authority and state law superseded other legal authorities," in reality "[j]urisdictional disputes became not just commonplace but a defining feature of the legal order").

<sup>34</sup> See Cover, *Nomos and Narrative*, *supra* note 26, at 11–15.

<sup>35</sup> Cf. Seyla Benhabib, *Another Cosmopolitanism* 49 (Robert Post, ed., 2006) 49 (2006) ("Whereas natural right philosophies assume that the principles that undergird democratic politics are impervious to transformative acts of popular collective will, and

Certainly individual communities may decide that their norms should trump those of others or that their norms are authoritative. So, for example, a liberal democratic state might decide that certain illiberal community practices are so beyond the pale that they cannot be countenanced, and therefore the state may invoke its authority to stifle those practices. But a cosmopolitan pluralist approach recognizes that such statements of normative commitment and authority are themselves subject to dispute. Accordingly, instead of clinging to the vain hope that unitary claims to authoritative law can ever be definitive, cosmopolitan pluralism recognizes the inevitability (if not always the desirability) of hybridity. Cosmopolitan pluralism is thus not a framework that dictates particular substantive outcomes. It observes that various actors pursue norms, and it studies the interplay, but it does not propose a hierarchy of substantive norms and values.

Nevertheless, while it does not offer *substantive* norms, a cosmopolitan pluralist approach may favor *procedural* mechanisms, institutions, and practices that provide opportunities for plural voices. Such procedures can potentially help to channel (or even tame) normative conflict to some degree by bringing multiple actors together into a shared social space. In addition, including multiple voices may lead to better substantive outcomes because such multiplicity provides the possibility for creative alternatives that might otherwise not be heard. This cosmopolitan pluralist commitment can, of course, have strong normative implications because it asks decision makers and institutional designers at least to consider the independent value of pluralism. For example, as discussed in more detail later, we might favor a hybrid domestic-international tribunal over either a fully domestic or a fully international one because it includes a more diverse range of actors, or we might favor complementarity or subsidiarity regimes because they encourage dialogue among

whereas legal positivism identifies democratic legitimacy with the correctly generated legal norms of a sovereign legislature, jurisgenerative politics is a model that permits us to think of creative interventions that mediate between universal norms and the will of democratic majorities.”).

multiple jurisdictions, and so on. And we might prefer conflict of law frameworks that recognize the reality of hybridity rather than arbitrarily choosing a single governing legal regime to resolve problems implicating multiple communities. In any event, cosmopolitan pluralism questions whether a single world public order of the sort often contemplated by both nation-state sovereigntists and international law triumphalists is achievable, even assuming it were desirable.

At the same time, mechanisms, institutions, and practices of the sort discussed in this book require actors at least to be willing to take part in a common set of discursive forms. This is not as idealistic as it may at first appear. As Jeremy Waldron has argued, “[t]he difficulties of inter-cultural or religious-secular dialogue are often exaggerated when we talk about the incommensurability of cultural frameworks and the impossibility of conversation without a common conceptual scheme. In fact conversation between members of different cultural and religious communities is seldom a dialogue of the deaf.”<sup>36</sup> Nevertheless, it is certainly true that some normative systems deny even this limited goal of mutual dialogue. Such systems would (correctly) recognize the liberal bias within the vision of procedural pluralism I explore here,<sup>37</sup> and they may reject the vision on that basis. For example, while abortion rights and antiabortion activists could, despite their differences, be said to share a willingness to engage in a common practice of constitutional adjudication, those bombing abortion clinics are not similarly willing, and accordingly there may not be any way to accommodate such actors even within a more pluralist framework. Likewise, communities that refuse to allow even the participation of particular subgroups, such as women or minorities, may be difficult to include within the cosmopolitan pluralist vision I have in mind. Of course, these

<sup>36</sup> Jeremy Waldron, Public Reason and “Justification” in the Courtroom, 1 *J.L. Phil. & Culture* 107, 112 (2007).

<sup>37</sup> This is not to say that the vision of pluralism I explore should be taken as synonymous with liberalism, though they share many attributes. Pluralism arguably assigns an independent value to dialogue among communities and an importance to community affiliation that is absent from (or at least less central to) liberal theory.



groups are undeniably important forces to recognize and take account of as a descriptive matter. But from a normative perspective, an embrace of a cosmopolitan pluralist jurisprudence need not commit one to a world-view free from judgment, where all positions are equivalently embraced. Thus, I argue not necessarily for undifferentiated inclusion, but for a set of procedural mechanisms, institutions, and practices that are more likely to expand the range of voices heard or considered, thereby creating more opportunities to forge a common social space than either sovereigntist territorialism or universalism.<sup>38</sup> In that sense, the vision I pursue here is at least partly indebted to the proceduralist vision of Jürgen Habermas<sup>39</sup> and can perhaps be embraced or criticized on similar grounds.

Chapter 2 begins by providing several illustrative examples of jurisdictional hybridity, where multiple legal norms of international, state, substate, and nonstate entities may overlap. I also introduce literature on legal pluralism and argue that pluralism provides a helpful framework for understanding a hybrid world where normative assertions of multiple entities – both state and nonstate – compete for primacy.

Chapters 3 and 4 then consider the two most common responses we see in the legal arena to the sort of hybridity described in Chapter 2: sovereigntist territorialism and universalism. While each of these approaches may sometimes be deemed necessary and may sometimes be useful in addressing overlapping norms, I argue that they have serious shortcomings. First, as a normative matter both sovereigntist territorialism and universalism retreat from the potential benefits of cosmopolitan pluralism by limiting the range of norms considered and the range of voices at the table. This may be a problem in and of itself because entertaining plural points of view within a procedural or institutional structure may carry independent benefits of inclusion, diversity, creativity,

<sup>38</sup> This focus on jurisgenerative structure, rather than on the necessary inclusion of, or deference to, all points of view, may differentiate legal pluralism as I use it here from multiculturalism.

<sup>39</sup> See generally Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans. William Rehg, 1996).

and dialogue that go beyond the outcome reached. And, of course, the outcome reached may also ultimately be more creative and more effective because of the diversity of input. Second, even if one is dubious about the normative case for cosmopolitan pluralism, I argue that, as a descriptive matter, neither sovereigntist territorialism nor universalism will actually be a fully effective response to a world of legal assertions beyond borders, and therefore a broader and more flexible framework will often be necessary simply to cope with the messy reality of law on the ground.

Chapters 5 and 6 lay out the core principles that undergird a cosmopolitan pluralist approach and then describe a variety of procedural mechanisms, institutional designs, and discursive practices already at play in the world that take such an approach. Although each of these examples can be subjected to criticism on a variety of grounds, they do at least attempt to build structures that seek to manage, without eliminating, pluralism.

Finally, Chapters 7 through 9 address the knotty doctrines known in the United States as conflict of laws, though sometimes referred to elsewhere as private international law. These doctrines attempt to negotiate the interaction of communities by delineating jurisdictional boundaries, determining which communities' norms should apply to multicommunity disputes, and analyzing the circumstances under which one community might enforce the judgment reached by another community. As such, these doctrines are potentially fundamental areas for employing a cosmopolitan pluralist frame to the legal negotiation of difference. Yet, too often conflict of laws is relegated to a technocratic process of trying to forge rules that will clarify boundaries and render only one community or one set of norms legitimate or dominant. I argue instead that these doctrines should engage interdisciplinary scholars of law and globalization and that they offer a potential site for creative thinking about the interaction of norms. And, although as noted previously my aim throughout the book is to suggest a conceptual approach not to provide doctrinal answers, I do

offer a few illustrative examples of how each of these conflicts doctrines might be affected by a cosmopolitan pluralist framework.

One final potential criticism of the book should perhaps be addressed at the outset. In the oft-discussed scholarly divide between “lumpers” and “splitters,”<sup>40</sup> I am clearly a “lumper.” That is, I offer here a highly synthetic account that draws ties among a wide variety of different doctrines and lumps together a variety of different scholarly positions into broader categories. As such, I can rightly be criticized for eliding potentially important distinctions and grouping together phenomena or perspectives that are quite different from each other. For example, I treat sovereigntist territorialism as a single perspective, even though it represents a wide variety of positions, some of which focus more on nation-state sovereignty, while others focus more on territorial approaches to conflict of laws, and so on. Yet, despite some obvious problems, I believe lumping nevertheless serves valuable purposes. By grouping together categories of thought and legal doctrines that are traditionally treated as distinct, we may be able to recognize broader patterns, make connections, and identify innovations that might otherwise have been opaque. Most importantly, while splitting is particularly useful for exploring fine distinctions with precision once a paradigm has been established, lumping can help foster the creative imaginings that make new paradigms possible. In any event, while both approaches are valuable and necessary, this book is dedicated to sparking broad-based creative thinking about a world of law beyond borders and therefore lumps concepts together, with all the advantages and disadvantages such an approach entails.

True to that lumping spirit, the book seeks to engage scholars from a wide variety of fields, including those in anthropology, sociology, cultural studies, international relations, and critical geography, as well as legal scholars studying Internet law, international business, trade and finance,

<sup>40</sup> See George Gaylord Simpson, *The Principles of Classification and a Classification of Mammals*, 85 *Bulletin of the American Museum of Natural History* 1, 23, (1945) (“Splitters [see] very small units .... Lumpers [see] only large units ....”) (alterations in original).

public international law, and conflict of laws. I also hope to contribute to ongoing debates about the efficacy of international law, changing structures of sovereignty, and cosmopolitan theory. I argue that rational choice understandings of how international law works or pure theory debates about sovereignty are limited because they focus too heavily on coercive power, thereby deemphasizing the role of rhetorical persuasion, informal articulations of legal norms, changes in legal consciousness, and networks of affiliation that may not possess literal enforcement power. Accordingly, my invocation of “law beyond borders” refers not only to the assertion of norms across territorial borders, but also the fact that legal articulations often function “beyond” the supposed conceptual borders between law on the one hand and political rhetoric on the other.<sup>41</sup> And if, as discussed previously, cosmopolitanism is defined not as universalism but as an acknowledgment of multiple affiliation and a call for conversation across difference, then this book also explores law as a crucial potential site for cosmopolitan dialogue.

In all of this discussion, I emphasize a cultural analysis of law, which argues that law both reflects and constructs social reality. This is, of course, not the only way of understanding how law operates. For example, one might think law is simply about constructing simple, easily defined rules that promote efficiency and predictability, regardless of how they reflect social reality. Yet, even if such an impulse is part of the web of rationales underlying legal rules, I believe it does not capture the rich reality of how law operates in relation to social life. Indeed, a simple formalist rule that fails to accord with social reality and lived experience tends to be replaced over time, first by what are known as legal fictions and then by new legal norms. For example, as discussed in more detail in Chapter 3, very clear, simple nineteenth-century jurisdictional rules that depended on physical presence in a territorial location could not cope with the changed social reality wrought by advances in transportation

<sup>41</sup> See Koskeniemi, *supra* note 31, at 69 (“Before any meaningful attempt at reform ... the idea of legal objectivity – and with it the conventional distinction between law, politics and morality (justice) needs to be rethought.”).

and communications technologies and the resulting shifts in how corporations and governments operated and how people increasingly lived their lives. Accordingly, those jurisdictional rules were altered, first, through somewhat strained judicially created notions of what constitutes “presence” in a location and then by a completely new legal regime for conceptualizing jurisdiction that shifted the focus away from simple physical presence. Thus, I start from the premise that social reality matters in legal discussions and that a more culturally based analytical framework should at least be an important part of our discussions of how to conceptualize law and globalization.

Ultimately, by studying the many local settings in which the norms of multiple communities – geographical, ethnic, national, and epistemic – become operative, scholars can gain a far more nuanced understanding of the international and transnational legal terrain. This is a world in which claims to coercive power, abstract notions of legitimacy, and arguments about legal authority are only part of an ongoing conversation, not the final determining factors. It is a world where “jurisgenerative” practices proliferate, creating opportunities for contestation and creative adaptation.<sup>42</sup> And though we may not like all the norms being articulated at any given moment, it will do no good to ignore them or insist on their lack of authority. In a hybrid world, law is an ongoing process of articulation, adaptation, rearticulation, absorption, resistance, deployment, and on and on. It is a process that never ends, and scholars and policy makers would do well to study the multiplicity and engage in the conversation, rather than impose a top-down framework that cannot help but distort the astonishing variety on the ground.

<sup>42</sup> See *id.* at 556, 596–9 (embracing international legal discourse as a space for “open political conflict and constant institutional revision”).